

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG 13 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0137-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
GEORGE SAINZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20093328001 and CR20093670001

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

George Sainz

Florence
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner George Sainz seeks review of the trial court’s orders summarily dismissing his petitions for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Sainz has not met his burden of establishing such abuse here.

¶2 Sainz pled guilty in separate cause numbers to attempted sexual assault and aggravated assault of a minor under the age of fifteen. The trial court sentenced him to concurrent prison terms, the longest of which was an aggravated term of 5.5 years for Sainz’s conviction of attempted sexual assault. Sainz filed notices of post-conviction relief in each cause number, and appointed counsel filed notices stating “there are no issues she can ethically raise on a Rule 32 petition.” Counsel nonetheless identified two “possible issues,” namely that Sainz had “not receive[d] a fair and/or complete presentence investigation” because the author of the presentence report allegedly terminated her interview with Sainz when Sainz refused to admit sexually assaulting the victim, and that it was “unclear” whether the court had received Sainz’s “letter written for his sentencing.” Counsel attached to the notices the letter Sainz purportedly had written for the court.

¶3 Sainz then filed identical pro se petitions for post-conviction relief in both cause numbers, arguing his due process rights had been violated because his presentence interview had not been completed and the trial court should have considered as a mitigating factor that he had pled guilty because he “did not want the victim in this case [to] go through the trial.” The court summarily dismissed Sainz’s petitions, stating it had

not relied “on any statement in the Pre-Sentence report in imposing the aggravated sentence” and that, although it had not received Sainz’s letter before sentencing, “the court has read the letter and finds it would have no impact whatsoever on the sentence imposed.”

¶4 On review, Sainz repeats his claim that his due process rights were violated when his presentence interview was terminated before completion and asserts, as we understand his argument, that he is entitled to a new presentence report and to be resentenced despite the fact the trial court stated it did not rely on statements in the presentence report in imposing an aggravated sentence. But, even when a presentence report contains inadmissible or incorrect information, a defendant is not entitled to relief absent a showing of prejudice—that is, a showing that the sentencing court considered improper information in determining the appropriate sentence. *See State v. West*, 176 Ariz. 432, 454, 862 P.2d 192, 214 (1993) (no prejudice where “defendant has not shown that the trial judge considered” improper information in presentence report), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, n.7, 961 P.2d 1006, 1012 n.7 (1998); *see also State v. Clabourne*, 142 Ariz. 335, 346, 690 P.2d 54, 65 (1984) (resentencing not required absent “prejudice to the defendant in the failure of the sentencing judge to review [presentence] report”); *State v. Dixon*, 21 Ariz. App. 517, 519, 521 P.2d 148, 150 (1974) (reviewing court “need not assume [trial court] was adversely influenced by any statement [in presentence report] which might have been improper”). Because the court did not rely on the presentence report in imposing an aggravated sentence, Sainz’s claim fails.

¶5

For the reasons stated, although we grant review, we deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge